

SENATE BILL NO. 94

INTRODUCED BY L. JENT

BY REQUEST OF THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING REQUIREMENTS FOR GROUND WATER APPROPRIATION IN CLOSED BASINS; ADDING MILK RIVER BASIN TO CLOSED BASIN GROUND WATER APPROPRIATION REQUIREMENTS; REVISING REQUIREMENTS FOR HYDROGEOLOGIC ASSESSMENTS, MITIGATION PLANS, AND AQUIFER RECHARGE PLANS; LIMITING SOURCES OF AQUIFER RECHARGE OR MITIGATION; REQUIRING THAT USE OF WATER CEASE AFTER AQUIFER TESTING; AMENDING SECTIONS 85-2-360, 85-2-361, 85-2-362, 85-2-363, 85-2-364, 85-2-369, AND 85-2-402, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-360, MCA, is amended to read:

"85-2-360. Ground water appropriation right in closed basins. (1) An application for a ground water appropriation right in a basin closed pursuant to 85-2-330, 85-2-336, 85-2-341, 85-2-343, or 85-2-344 or administratively closed pursuant to 85-2-319 or 85-2-321 must be accompanied by a hydrogeologic assessment that has been conducted pursuant to 85-2-361 to predict whether the proposed appropriation right will result in a net depletion of surface water and must be accompanied by ~~a~~ an aquifer recharge or mitigation plan, or both, as provided in 85-2-362, if necessary.

(2) (A) Ground water applications for nonconsumptive uses are exempt from the requirements in subsection (1), and the department shall proceed under the criteria in 85-2-311.

(B) FOR THE PURPOSES OF THIS SECTION, NONCONSUMPTIVE USE MEANS A BENEFICIAL USE OF WATER THAT:

(i) DOES NOT CAUSE A REDUCTION IN THE SOURCE OF SUPPLY;

(ii) RETURNS SUBSTANTIALLY ALL OF THE WATER TO THE SOURCE OF SUPPLY; AND

(iii) CAUSES LITTLE OR NO DISRUPTION IN GROUND WATER OR STREAM CONDITIONS.

(3) If the hydrogeologic assessment conducted pursuant to 85-2-361 predicts that the proposed appropriation right will not result in a net depletion of surface water, the department shall proceed under the criteria provided in 85-2-311.

(3)(4) (a) If the hydrogeologic assessment predicts that the proposed appropriation right will result in a net depletion of surface water, the applicant shall analyze whether the net depletion results in an adverse effect on a prior appropriator. If the applicant provides a correct and complete application, the department shall proceed to process the application as provided in 85-2-363.

(b) If the applicant has used the water for the purpose of ~~conducting the hydrogeologic assessment~~ aquifer testing, the applicant shall terminate the use of the water when testing is complete. Failure to terminate use of the water ~~must~~ may result in a fine of not more than \$1,000 for each day of the violation.

(4)(5) If the hydrogeologic assessment predicts that there will be net depletion as provided in subsection (3)(a) (4)(a), the department may proceed to process the application pursuant to 85-2-363 if, in addition to other applicable criteria, the applicant complies with 85-2-362.

(5)(6) For the purposes of 85-2-360 through 85-2-362, the prediction of net depletion does not mean that an adverse effect on a prior appropriator will occur or if an adverse effect does occur that the entire amount of net depletion is the cause of the adverse effect. A determination of whether or not there is an adverse effect on a prior appropriator as the result of a new appropriation right is a determination that must be made by the department based on the amount, location, and timing ~~duration of the amount of~~ net depletion that causes the adverse effect relative to the ~~historic beneficial use of the~~ appropriation right that may be adversely affected.

(6)(7) The priority date for an appropriation right that is granted to an entity whose permit application was returned after April 11, 2006, and before May 3, 2007, because of the department's interpretation of a court decision is the date of the initial application to the department."

Section 2. Section 85-2-361, MCA, is amended to read:

"85-2-361. Hydrogeologic assessment -- definition -- minimum requirements. (1) (a) For the purposes of 85-2-360 through 85-2-362, "hydrogeologic assessment" means a report for the project ~~for or through which water will be put to beneficial use, the point of diversion, and the place of use~~ prepared by a hydrogeologist, a qualified scientist, or a qualified, licensed professional engineer that describes the geology, hydrogeologic environment, including hydraulic properties and aquifer boundaries, water quality with regard to the provisions of 75-5-410 and 85-2-364, and predicted net depletion, if any; IF ANY, including the amount, LOCATION, AND timing; and location of ANY any net depletion, for of surface water within the potentially affected area DESCRIBED IN SUBSECTION (2)(A). The report also must describe water quality and any water treatment method that will be used at the time of any type of injection or introduction of water to an aquifer to demonstrate compliance with 75-5-410,

~~85-2-364, and water quality laws under Title 75, chapter 5, described in subsection (2)(a)(i) within the closed basins that are subject to an appropriation right, including but not limited to rivers, streams, irrigation canals, or drains that might be affected by the new appropriation right and any predicted water quality changes that may result.~~

(b) In predicting net depletion of surface water from a proposed use, consideration must be given, at a minimum, to:

(i) the actual amount diverted ~~for like beneficial uses~~ and consumed;

~~(ii) any amounts that will likely be lost in conveyance, if any, and whether any lost amounts are lost to the system through evaporation or other means or whether those amounts are returned to the system through percolation or other means; and~~

~~(iii)~~(ii) any return flows from the proposed use, including but not limited to any treated wastewater return flows if the treated wastewater that is considered effluent meets the requirements of 75-5-410 and 85-2-364.

(2) A HYDROGEOLOGIC ASSESSMENT THAT WILL BE USED TO PREDICT NET DEPLETION OF SURFACE WATER RESULTING FROM A NEW APPROPRIATION RIGHT MUST INCLUDE HYDROGEOLOGIC DATA OR A MODEL THAT INCLUDES:

(A) THE AREA OR ESTIMATED AREA OF GROUND WATER THAT WILL BE AFFECTED, NOT TO EXCEED THE BOUNDARIES OF THE DRAINAGE SUBDIVISIONS ESTABLISHED BY THE OFFICE OF WATER DATA COORDINATION, UNITED STATES GEOLOGICAL SURVEY, AND USED BY THE WATER COURT, UNLESS THE APPLICANT CHOOSES TO EXPAND THE BOUNDARIES;

(B) THE GEOLOGY OF THE AREA IDENTIFIED IN SUBSECTION (2)(A), INCLUDING STRATIGRAPHY AND STRUCTURE;

(C) THE PARAMETERS OF THE AQUIFER SYSTEM WITHIN THE AREA IDENTIFIED IN SUBSECTION (2)(A) THAT IS ASSESSED IN THE DATA OR MODEL;

(D) THE LOCATIONS OF SURFACE WATERS WITHIN THE AREA DESCRIBED IN SUBSECTION (2)(A) THAT ARE SUBJECT TO AN APPROPRIATION RIGHT, INCLUDING BUT NOT LIMITED TO SPRINGS, CREEKS, STREAMS, OR RIVERS THAT MAY OR MAY NOT SHOW A NET DEPLETION;

(E) EVIDENCE OF WATER AVAILABILITY; AND

(F) THE LOCATIONS OF ALL WELLS OR OTHER SOURCES OF GROUND WATER OF RECORD WITHIN THE AREA IDENTIFIED IN SUBSECTION (2)(A).

~~(2) (a) A hydrogeologic assessment that will be used to predict net depletion of surface water resulting from a new appropriation right must include hydrogeologic data or a model developed by a hydrogeologist, a qualified scientist, or a qualified licensed professional engineer that incorporates for the new appropriation:~~

1 ~~—— (i) the area or estimated area of ground water that will be affected, not to exceed the boundaries of the~~
2 ~~drainage subdivisions established by the office of water data coordination, United States geological survey, and~~
3 ~~used by the water court, unless the applicant chooses to expand the boundaries;~~

4 ~~—— (ii) the geology in the area identified in subsection (2)(a)(i), including stratigraphy and structure;~~

5 ~~—— (iii) the parameters of the aquifer system within the area identified in subsection (2)(a)(i) to include, at a~~
6 ~~minimum, estimates for:~~

7 ~~—— (A) the lateral and vertical extent of the aquifer;~~

8 ~~—— (B) whether the aquifer is confined or unconfined;~~

9 ~~—— (C) the effective hydraulic conductivity of the aquifer;~~

10 ~~—— (D) transmissivity and storage coefficient related to the aquifer; and~~

11 ~~—— (E) the estimated flow direction or directions of ground water and the rate of movement;~~

12 ~~—— (iv) the locations of surface waters within the area described in subsection (2)(a)(i) that are subject to an~~
13 ~~appropriation right, including but not limited to springs, creeks, streams, or rivers that may or may not show a net~~
14 ~~depletion;~~

15 ~~—— (v) evidence of water availability; and~~

16 ~~—— (vi) the locations of all wells or other sources of ground water of record within the area identified in~~
17 ~~subsection (2)(a)(i).~~

18 ~~—— (b) A hydrogeologic assessment must also include a water quality report that includes:~~

19 ~~—— (i) the location of existing documented hazards that could be affected or exacerbated by the~~
20 ~~appropriation right, such as areas of subsidence, along with a plan to mitigate any conditions or impacts;~~

21 ~~—— (ii) other water quality information necessary to comply with 75-5-410 and 85-2-364; and~~

22 ~~—— (iii) a description of any water treatment method that will be used at the time of any type of injection or~~
23 ~~introduction of water to the aquifer to ensure compliance with 75-5-410 and 85-2-364 and the water quality laws~~
24 ~~under Title 75, chapter 5.~~

25 ~~—— (3) The hydrogeologic assessment must include an analysis of whether the information required by~~
26 ~~subsection (2) predicts that there may be a net depletion of surface water in the area described in subsection~~
27 ~~(2)(a)(i) and the extent of the depletion, if any.~~

28 (3) THE HYDROGEOLOGIC ASSESSMENT MUST INCLUDE AN ANALYSIS OF WHETHER THE INFORMATION REQUIRED
29 BY SUBSECTION (2) PREDICTS THAT THERE MAY BE A NET DEPLETION OF SURFACE WATER IN THE AREA DESCRIBED IN
30 SUBSECTION (2)(A) AND THE EXTENT OF THE DEPLETION, IF ANY.

~~(4)(2)(4)~~ The correct and complete hydrogeologic assessment, the model if ~~provided~~ used, the test well data, ~~the monitoring well data~~, THE MONITORING WELL DATA, and other related information must be submitted to the department. The department shall submit this information from a correct and complete application to the bureau of mines and geology. The bureau of mines and geology and the department shall determine the required format for the information. The bureau of mines and geology shall ensure that information submitted pursuant to this section is entered into the ground water information center database as part of the ground water assessment program.

~~(5)(3)(5)~~ An entity that has previously conducted some type of hydrogeologic assessment may submit the information from that assessment as the hydrogeologic assessment required by this section if the information meets the criteria and requirements of this section."

Section 3. Section 85-2-362, MCA, is amended to read:

"85-2-362. Aquifer recharge or mitigation plans in closed basins -- minimum requirements. (1) An applicant whose hydrogeologic assessment conducted pursuant to 85-2-361 predicts that there will be a net depletion of surface water shall offset the net depletion that results in the adverse effect through a mitigation plan or an aquifer recharge plan. An aquifer recharge or mitigation plan, or both, must provide evidence of how the plan will offset the net depletion of surface water from an appropriation of water that results in an adverse effect, including, at a minimum, evidence:

~~(2) A mitigation plan must include:~~

- ~~—— (a) where and how the water in the plan will be put to beneficial use;~~
- ~~—— (b) when and where, generally, water reallocated through exchange or substitution will be required;~~
- ~~—— (c) the amount of water reallocated through exchange or substitution that is required;~~
- ~~—— (d) how the proposed project or beneficial use for which the mitigation plan is required will be operated;~~
- ~~—— (e) evidence~~
 - (a) of the amount of water reallocated through exchange or substitution;
 - (b) of the general timing and location of the water reallocated through exchange or substitution;
 - ~~—— (c) of how the mitigation water in the plan will be put to beneficial use;~~
 - (d)(c) that the mitigation water will be available;
 - (e)(D) of how the mitigation water in the plan will be protected and how it will be measured or accounted for; and

1 ~~(f)(E)~~ that an application for a change in appropriation right, if necessary, has been submitted;_

2 ~~(f) evidence of water availability; and~~

3 ~~—— (g) evidence of how the mitigation plan will offset the required amount of net depletion of surface water~~
4 ~~in a manner that will offset an adverse effect on a prior appropriator.~~

5 ~~—— (3) An aquifer recharge plan must include:~~

6 ~~—— (a) evidence that the appropriate water quality related permits have been granted pursuant to Title 75,~~
7 ~~chapter 5, and pursuant to 75-5-410 and 85-2-364;~~

8 ~~—— (b) where and how the water in the plan will be put to beneficial use;~~

9 ~~—— (c) when and where, generally, water reallocated through exchange or substitution will be required;~~

10 ~~—— (d) the amount of water reallocated through exchange or substitution that is required;~~

11 ~~—— (e) how the proposed project or beneficial use for which the aquifer recharge plan is required will be~~
12 ~~operated;~~

13 ~~—— (f) evidence that an application for a change in appropriation right, if necessary, has been submitted;~~

14 (2) In addition to the requirements in subsection (1), an aquifer recharge plan must also include:

15 ~~(g)~~(a) a description of the process by which water will be reintroduced to the aquifer; and

16 ~~(b) evidence that the appropriate water quality permits have been applied for pursuant to 75-5-410,~~
17 ~~85-2-364, and Title 75, chapter 5.~~

18 ~~(h) evidence of water availability; and~~

19 ~~—— (i) evidence of how the aquifer recharge plan will offset the required amount of net depletion of surface~~
20 ~~water in a manner that will offset any adverse effect on a prior appropriator.~~

21 (3) A mitigation plan or aquifer recharge plan may not include the proposed elimination of vegetation FOR
22 WHICH THERE IS NOT AN ASSOCIATED WATER RIGHT.

23 (4) A mitigation plan or aquifer recharge plan may not include the use of tributary water collected from
24 land surfaces that have been made impermeable, thereby increasing the runoff but not adding to the existing
25 supply of tributary water. THIS SUBSECTION DOES NOT APPLY TO ACTIONS THAT INCREASE THE EFFICIENCY OF EXISTING
26 CONVEYANCE STRUCTURES.

27 ~~(4)(5)~~ The department may not require an applicant, through a mitigation plan or an aquifer recharge
28 plan, to provide more water than the quantity needed to offset the adverse effects on a prior appropriator caused
29 by the net depletion.

30 ~~(5)(6)~~ An appropriation right that relies on a mitigation plan or aquifer recharge plan to offset net

1 depletion of surface water that results in an adverse effect on a prior appropriator must be issued as a conditional
2 permit that requires that the mitigation plan or aquifer recharge plan must be exercised when the appropriation
3 right is exercised."

4
5 **Section 4.** Section 85-2-363, MCA, is amended to read:

6 **"85-2-363. Process for combining decisions on ground water permit applications in closed**
7 **basins.** (1) An applicant for a permit to appropriate ground water in a closed basin shall submit to the department
8 a combined application consisting of a hydrogeologic assessment with an analysis of net depletion, a mitigation
9 plan or aquifer recharge plan if required, an application for a beneficial water use permit or permits, and an
10 application for a change in appropriation right or rights if necessary.

11 (2) The department shall review the combined application to determine if it is correct and complete under
12 the process and requirements of 85-2-302.

13 (3) (a) Once ~~an~~ a combined application has been determined to be correct and complete, the department
14 shall prepare a notice and publish it as provided under 85-2-307.

15 (b) If no valid objection to the combined application is filed and the applicant proves that the criteria of
16 85-2-311 or 85-2-402, if necessary, have been satisfied, the combined application must be granted or approved
17 in a modified form or upon terms, conditions, or limitations specified by the department.

18 (c) If no valid objection to the combined application is filed and the applicant has not proved that the
19 criteria of 85-2-311 or 85-2-402, if necessary, have been satisfied, the combined application must be denied after
20 an opportunity for a show cause hearing.

21 (d) If a valid objection to the combined application is filed, the department shall proceed to process the
22 combined application pursuant to 85-2-308 through 85-2-311 and 85-2-402. ~~If the applicant satisfies the criteria~~
23 ~~of 85-2-311 or 85-2-402, if necessary, and proves by a preponderance of the evidence that net depletion, if any,~~
24 ~~will not adversely affect a prior appropriator based on the applicant's mitigation plan or aquifer recharge plan, the~~
25 ~~department shall issue the permit."~~

26
27 **Section 5.** Section 85-2-364, MCA, is amended to read:

28 **"85-2-364. Department permit coordination -- requirements for aquifer recharge plans.** To ensure
29 that the department and the department of environmental quality are coordinating their respective permitting
30 activities:

(1) an applicant for a new appropriation right pursuant to 85-2-360 that involves aquifer recharge and requires a discharge permit pursuant to Title 75, chapter 5, shall provide the department with a copy of a relevant discharge permit if necessary evidence that an application for the discharge permit has been submitted to the department of environmental quality; and

(2) the department may not grant a new appropriation right pursuant to 85-2-360 that involves aquifer recharge until the discharge permit, if necessary, has been obtained and presented to the department."

Section 6. Section 85-2-369, MCA, is amended to read:

"85-2-369. Aquifer testing, test well, or monitoring well data submission -- not beneficial use. (1)

All aquifer testing data and other related information from test wells, monitoring wells, or other sources that is collected for the purpose of obtaining a new appropriation right or a change in appropriation right pursuant to 85-2-360 through 85-2-362 must be submitted to the department and the bureau of mines and geology in a form prescribed by the department and the bureau of mines and geology. The bureau of mines and geology shall ensure that information submitted pursuant to this section is entered into the ground water information center database as part of the ground water assessment program.

(2) (a) Water testing or monitoring is not a beneficial use of water requiring the filing of a permit application.

(b) A permit is not required if the intent of a person is to conduct aquifer tests, water quality tests, water level monitoring, or other testing or monitoring of a water source.

(c) Upon completion of the activities described in subsection (2)(b), the applicant shall terminate use of the water."

Section 7. Section 85-2-402, MCA, is amended to read:

"85-2-402. Changes in appropriation rights -- definition. (1) (a) The right to make a change in appropriation right subject to the provisions of this section in an existing water right, a permit, or a state water reservation is recognized and confirmed. In a change in appropriation right proceeding under this section, there is no presumption that an applicant for a change in appropriation right cannot establish lack of adverse effect prior to the adjudication of other rights in the source of supply pursuant to this chapter. Except as provided in 85-2-410 and subsections (15) and (16) of this section, an appropriator may not make a change in an appropriation right without the approval of the department or, if applicable, of the legislature. An applicant shall submit a correct and

1 complete application.

2 (b) If an application involves a change in a point of diversion, conveyance, or place of use located on
3 national forest system lands, the application is not correct and complete until the applicant has submitted proof
4 to the department of any written special use authorization required by federal law for the proposed change in
5 occupancy, use, or traverse of national forest system lands for the purpose of diversion, impoundment, storage,
6 transportation, withdrawal, use, or distribution of water.

7 (c) As used in this part, "national forest system lands" has the same meaning as that provided in
8 85-20-1401, Article I.

9 (2) Except as provided in subsections (4) through (6), (15), and (16) and, if applicable, subject to
10 subsection (17), the department shall approve a change in appropriation right if the appropriator proves by a
11 preponderance of evidence that the following criteria are met:

12 (a) The proposed change in appropriation right will not adversely affect the use of the existing water
13 rights of other persons or other perfected or planned uses or developments for which a permit or certificate has
14 been issued or for which a state water reservation has been issued under part 3.

15 (b) The proposed means of diversion, construction, and operation of the appropriation works are
16 adequate, except for: ~~Except for~~

17 (i) a change in appropriation right for instream flow to protect, maintain, or enhance streamflows to
18 benefit the fishery resource pursuant to 85-2-436; ~~or~~

19 (ii) a temporary change in appropriation right authorization to maintain or enhance streamflows to benefit
20 the fishery resource pursuant to 85-2-408; ~~or~~

21 (iii) a change in appropriation right to instream flow to protect, maintain, or enhance streamflows pursuant
22 to 85-2-320; or

23 (iv) THAT PORTION OF A CHANGE IN APPROPRIATION RIGHT TO INSTREAM FLOW FOR a mitigation plan ~~the~~
24 ~~proposed means of diversion, construction, and operation of the appropriation works are adequate.~~

25 (c) The proposed use of water is a beneficial use.

26 (d) Except for a change in appropriation right for instream flow to protect, maintain, or enhance
27 streamflows to benefit the fishery resource pursuant to 85-2-436, ~~or~~ a temporary change in appropriation right
28 authorization pursuant to 85-2-408, ~~or~~ a change in appropriation right to instream flow to protect, maintain, or
29 enhance streamflows pursuant to 85-2-320, or THAT PORTION OF A CHANGE IN APPROPRIATION RIGHT TO INSTREAM
30 FLOW FOR a mitigation plan, the applicant has a possessory interest, or the written consent of the person with the

1 possessory interest, in the property where the water is to be put to beneficial use or, if the proposed change
2 involves a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any
3 written special use authorization required by federal law to occupy, use, or traverse national forest system lands
4 for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water.

5 (e) If the change in appropriation right involves salvaged water, the proposed water-saving methods will
6 salvage at least the amount of water asserted by the applicant.

7 (f) The water quality of an appropriator will not be adversely affected.

8 (g) The ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance
9 with Title 75, chapter 5, part 4, will not be adversely affected.

10 (3) The applicant is required to prove that the criteria in subsections (2)(f) and (2)(g) have been met only
11 if a valid objection is filed. A valid objection must contain substantial credible information establishing to the
12 satisfaction of the department that the criteria in subsection (2)(f) or (2)(g), as applicable, may not be met.

13 (4) The department may not approve a change in purpose of use or place of use of an appropriation of
14 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator
15 proves by a preponderance of evidence that:

16 (a) the criteria in subsection (2) are met; and

17 (b) the proposed change in appropriation right is a reasonable use. A finding of reasonable use must
18 be based on a consideration of:

19 (i) the existing demands on the state water supply, as well as projected demands for water for future
20 beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the
21 protection of existing water rights and aquatic life;

22 (ii) the benefits to the applicant and the state;

23 (iii) the effects on the quantity and quality of water for existing uses in the source of supply;

24 (iv) the availability and feasibility of using low-quality water for the purpose for which application has been
25 made;

26 (v) the effects on private property rights by any creation of or contribution to saline seep; and

27 (vi) the probable significant adverse environmental impacts of the proposed use of water as determined
28 by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

29 (5) The department may not approve a change in purpose of use or place of use for a diversion that
30 results in 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water being consumed

1 unless:

2 (a) the applicant proves by clear and convincing evidence and the department finds that the criteria in
3 subsections (2) and (4) are met; and

4 (b) for the withdrawal and transportation of appropriated water for out-of-state use, the department then
5 petitions the legislature and the legislature affirms the decision of the department after one or more public
6 hearings.

7 (6) The state of Montana has long recognized the importance of conserving its public waters and the
8 necessity to maintain adequate water supplies for the state's water requirements, including requirements for
9 federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in
10 trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes
11 that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict
12 with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before
13 out-of-state use may occur:

14 (a) The department and, if applicable, the legislature may not approve a change in appropriation right
15 for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator
16 proves by clear and convincing evidence and, if applicable, the legislature approves after one or more public
17 hearings that:

18 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of
19 subsection (2) or (4) are met;

20 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

21 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens
22 of Montana.

23 (b) In determining whether the appropriator has proved by clear and convincing evidence that the
24 requirements of subsections (6)(a)(ii) and (6)(a)(iii) will be met, the department and, if applicable, the legislature
25 shall consider the following factors:

26 (i) whether there are present or projected water shortages within the state of Montana;

27 (ii) whether the water that is the subject of the proposed change in appropriation might feasibly be
28 transported to alleviate water shortages within the state of Montana;

29 (iii) the supply and sources of water available to the applicant in the state where the applicant intends to
30 use the water; and

1 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the
2 water.

3 (c) When applying for a change in appropriation right to withdraw and transport water for use outside
4 the state, the applicant shall submit to and comply with the laws of the state of Montana governing the
5 appropriation and use of water.

6 (7) For any application for a change in appropriation right involving 4,000 or more acre-feet of water a
7 year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change
8 in appropriation right in accordance with 85-2-307 and shall hold one or more hearings in accordance with
9 85-2-309 prior to its approval or denial of the proposed change in appropriation right. The department shall
10 provide notice and may hold one or more hearings upon any other proposed change in appropriation right if it
11 determines that the proposed change in appropriation right might adversely affect the rights of other persons.

12 (8) The department or the legislature, if applicable, may approve a change in appropriation right subject
13 to the terms, conditions, restrictions, and limitations that it considers necessary to satisfy the criteria of this
14 section, including limitations on the time for completion of the change in appropriation right. The department may
15 extend time limits specified in the change in appropriation right approval under the applicable criteria and
16 procedures of 85-2-312(3).

17 (9) Upon actual application of water to the proposed beneficial use within the time allowed, the
18 appropriator shall notify the department that the appropriation has been completed. The notification must contain
19 a certified statement by a person with experience in the design, construction, or operation of appropriation works
20 describing how the appropriation was completed.

21 (10) If a change in appropriation right is not completed as approved by the department or legislature or
22 if the terms, conditions, restrictions, and limitations of the change in appropriation right approval are not complied
23 with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why
24 the change in appropriation right approval should not be modified or revoked. If the appropriator fails to show
25 sufficient cause, the department may modify or revoke the change in appropriation right approval.

26 (11) The original of a change in appropriation right approval issued by the department must be sent to
27 the applicant, and a duplicate must be kept in the office of the department in Helena.

28 (12) A person holding an issued permit or change in appropriation right approval that has not been
29 perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an
30 application for change in appropriation right pursuant to this section.

(13) A change in appropriation right contrary to the provisions of this section is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized change in appropriation right. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.

(14) The department may adopt rules to implement the provisions of this section.

(15) (a) An appropriator may change an appropriation right for a replacement well without the prior approval of the department if:

(i) the appropriation right is for:

(A) ground water outside the boundaries of a controlled ground water area; or

(B) ground water inside the boundaries of a controlled ground water area and if the provisions of the order declaring the controlled ground water area do not restrict a change in appropriation right;

(ii) the change in appropriation right is to replace an existing well and the existing well will no longer be used;

(iii) the rate and volume of the appropriation from the replacement well are equal to or less than that of the well being replaced and do not exceed:

(A) 450 gallons a minute for a municipal well; or

(B) 35 gallons a minute and 10 acre-feet a year for all other wells;

(iv) the water from the replacement well is appropriated from the same aquifer as the water appropriated from the well being replaced; and

(v) a timely, correct, and complete notice of replacement well is submitted to the department as provided in subsection (15)(b).

(b) (i) After completion of a replacement well and appropriation of ground water for a beneficial use, the appropriator shall file a notice of replacement well with the department on a form provided by the department.

(ii) (A) The department shall review the notice of replacement well and shall issue an authorization of a change in an appropriation right if all of the criteria in subsection (15)(a) have been met and the notice is correct and complete.

(B) If the replacement well is located on national forest system lands, the notice is not correct and complete under this subsection (15) until the appropriator has submitted proof of any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of constructing the replacement well.

(iii) The department may not issue an authorization of a change in appropriation right until a correct and complete notice of replacement well has been filed with the department. The department shall return a defective notice to the appropriator, along with a description of defects in the notice. The appropriator shall refile a corrected and completed notice of replacement well within 30 days of notification of defects or within a further time as the department may allow, not to exceed 6 months.

(iv) If a notice of replacement well is not completed within the time allowed, the appropriator shall:

(A) cease appropriation of water from the replacement well pending approval by the department; and

(B) submit an application for a change in appropriation right to the department pursuant to subsections (1) through (3).

(c) The provisions of this subsection (15) do not apply to an appropriation right abandoned under 85-2-404.

(d) For each well that is replaced under this subsection (15), the appropriator shall follow the well abandonment procedures, standards, and rules adopted by the board of water well contractors pursuant to 37-43-202.

(e) The provisions of subsections (2), (3), (9), and (10) do not apply to a change in appropriation right that meets the requirements of subsection (15)(a).

(16) (a) An appropriator may change an appropriation right without the prior approval of the department for the purpose of constructing a redundant water supply well in a public water supply system, as defined in 75-6-102, if the redundant water supply well:

(i) withdraws water from the same ground water source as the original well; and

(ii) is required by a state or federal agency.

(b) The priority date of the redundant water supply well is the same as the priority date of the original well. Only one well may be used at one time.

(c) Within 60 days of completion of a redundant water supply well, the appropriator shall file a notice of construction of the well with the department on a form provided by the department. The department may return a defective notice of construction to the appropriator for correction and completion. If the redundant water supply well is located on national forest system lands, the notice is not correct and complete under this subsection until the appropriator has submitted proof of any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of constructing the redundant water supply well.

(d) The provisions of subsections (9) and (10) do not apply to a change in appropriation right that meets

1 the requirements of this subsection (16).

2 (17) The department shall accept and process an application for a change in appropriation right for
3 instream flow to protect, maintain, or enhance streamflows pursuant to 85-2-320 and this section and to benefit
4 the fishery resource pursuant to 85-2-436 and this section."

5
6 **NEW SECTION. Section 8. Saving clause.** [This act] does not affect rights and duties that matured,
7 penalties that were incurred, or proceedings that were begun before [the effective date of this act].

8
9 **NEW SECTION. Section 9. Severability.** If a part of [this act] is invalid, all valid parts that are severable
10 from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part
11 remains in effect in all valid applications that are severable from the invalid applications.

12
13 **NEW SECTION. Section 10. Effective date.** [This act] is effective on passage and approval.

14
15 **NEW SECTION. SECTION 11. APPLICABILITY. [THIS ACT] APPLIES TO APPLICATIONS RECEIVED BY THE**
16 **DEPARTMENT AFTER [THE EFFECTIVE DATE OF THIS ACT].**

17 - END -